

Bar Standards Board Independent Observer's Annual Report June 2012 - May 2013

Introduction

My role as the Bar Standard Board's (BSB's) Independent Observer is to provide independent assurance to the Governance, Risk & Audit Committee and ultimately the Board that the BSB's complaints and disciplinary system is operating in line with its aims and objectives (Annex 1).

Scope of Work

During the period June 2012 – May 2013 (my second year in post), I spent 55 days observing the BSB's handling of complaints and disciplinary matters. My activities included;

- observing the Professional Conduct Department (PCD) at work
- attending 7 Professional Conduct Committee (PCC) meetings and reviewing all papers
- reviewing samples of case files and raising queries with case officers
- observing 7 Disciplinary Tribunals and 1 Appeal before the Visitors
- interviewing one of the BSB's prosecutors
- reviewing Professional Conduct Department quarterly and annual performance reports

Limit on Assurance

My observations are made as a lay independent observer and my conclusions are necessarily limited by the sample size of cases reviewed.

The BSB's PCD prepares and publishes detailed quarterly and annual performance reports (available on the BSB's website). I have reviewed these and they have informed my areas of focus but I have not sought to audit or otherwise verify the data.

During the year, the Council of the Inns of Court (COIC) Disciplinary Tribunal and Hearings Review Group, completed a review of whether COIC's procedures were 'in line with the best regulatory practice' and whether there was 'a proper degree of independence from the Bar Standards Board'. COIC is responsible for the composition and administration of the Bar's disciplinary tribunals to which the BSB refers allegations of professional conduct arising out of external complaints and its own motion complaints. The BSB has overall statutory responsibility for these arrangements. The Review Group's final report (July 2012), identified a number of administrative failures and made 82 recommendations 'intended to put the Tribunals Service on an up-to-date professional footing for the future'. The actions being taken to address them have been subject to scrutiny by a dedicated Project Board (which meets monthly) and overseen by the BSB's main Board. Rather than duplicate this review or distract from the implementation of the recommendations, I have focused on 'steady state' handling of complaints.

I have not sought to examine the merit of individual decisions, but rather the application of policies and procedures in the context of the BSB's overarching aims and objectives.

Areas of focus

Over the course of this year, I have focused on the following

- investigation processes, procedures and practice
- turnaround times
- BSB prosecutions and lessons learnt
- 'inactive' cases i.e. open cases which appeared not to have had any recent activity
- cases outside the new key performance indicators (KPIs) i.e. long running cases
- so-called complainant 'comebacks' following the dismissal of their complaint

General observations

This is my second year as the BSB's Independent Observer and overall, my observations continue to be positive. I have made six recommendations (listed in Annex 2), all of which have been accepted.

I am impressed by the collective dedication of the PCD and the PCC to ensuring that policies and procedures are robust and that their handling of complaints and disciplinary processes is prompt, thorough and fair. I have consistently observed good practice and encountered a healthy attitude to constructive challenge and genuine commitment to continuous improvement.

During the past year, notwithstanding new demands such as the additional work generated by the COIC review (see above) and the organisation-wide move towards more outcome focused regulation and associated 'Change Programme', I have observed sustained momentum with day-to-day case handling and steps to improve efficiency.

My observation is that increased Committee, Board and management focus on turnaround times via the new Key Performance Indicators (KPIs) has had a positive impact in terms of awareness and efforts to minimise avoidable delays. To date, I have not seen any evidence to suggest that this has been at the expense of thoroughness or fairness. Case officers and supervisors are now much more familiar with the service standards expected for each stage of the process and refer regularly to 'early warning' caseload reports which list all the cases they are responsible for and flag those approaching or exceeding service standards for a particular stage, assisting them in prioritising their work and minimising avoidable delays.

When reviewing case files and discussing them with case officers, I continue to be impressed by their familiarity with the specific aspects of each case, their detailed knowledge of policies, procedures and precedents, their attention to detail and above all their commitment to fairness; often in the face of challenges from both complainants and/or barristers and their representatives. The PCD's written communications and records are well organised, comprehensive and complete. In the couple of instances where I have identified papers have been missing from paper files, these were readily retrieved from the electronic records. There are generally very clear audit trails for decisions including file notes for internal discussions and written advice from Committee Members and Office Holders. It has therefore been straightforward for me to trace progress and decision making on individual cases against departmental policies and procedures.

I welcome the steps that the PCC is taking to strengthen the documented audit trail for Committee decisions by creating fuller minutes of Committee decisions. The BSB has also decided that with effect from 1 May 2013, it will disclose on request Case Examiner analysis sheets to barristers facing allegations of misconduct after cases have been considered at a meeting. These analysis sheets inform PCC discussions and decision making. Coupled with fuller minuting of Committee decisions, the disclosure of Case Examiner reports will increase transparency. One of my latest recommendations (see Annex 2 H2R3) is designed to ensure that the BSB's disclosure policy is itself more prominent so that complainants, barristers, the wider profession and the general public can more readily identify what information is or can be made available in relation to complaints and disciplinary proceedings.

Complainant 'comebacks'

The BSB's website ('General FAQs about our complaints and disciplinary processes') explains to complainants that 'there is no right of appeal against decisions taken either by staff or the Committee in relation to your complaint' and that 'neither the Chair nor the Director of the BSB have any powers to overturn decisions taken by staff or the Committee in relation to individual complaints'. The website indicates that the BSB is 'able to reconsider decisions where the complainant has new evidence relevant to the decision or where they can show any other good reason for review'. Complaints Rule 41 gives the PCC power to reopen or reconsider a complaint in these circumstances. This is an internal process.

When a complainant contacts the BSB objecting to a dismissal decision (known as a 'comeback') then the procedure is for the case file to be referred for re-examination by the next more senior decision maker to ascertain whether there is new evidence or some other good reason to re-open or re-consider the case.

'New evidence' could be documentary evidence which was not available at the time the original decision was made which indicates that the behaviour in question did amount to a breach of the Code, has a significant impact on the level of culpability of the barrister or considerably strengthens the BSB's ability to prove charges laid against a barrister. Examples of 'other good reasons' why a case could be reconsidered include errors by staff (such as overlooking evidence or an aspect of the complaint) or errors by the Committee (such as a Case Examiner failing to mention a material fact in a Committee report).

During the two year period 1st January 2011 – 30th January 2013, 115 'comebacks' were recorded. Unsurprisingly, the majority of these were in relation to original decisions taken at an early stage by the Assessment Team (i.e. following dismissal *without investigation* rather than cases which have been subject to full investigation). All were duly referred to a more senior decision maker for review. For the sample of files I examined, there was clear evidence on file of a meaningful review in each case.

Overall, the vast majority of comebacks did not result in further action. In my view this should instil confidence in the original decision making processes. I can give assurance that there were case specific reasons for reopening the small number of cases that were reopened, rather than mistakes, oversights or anything that would prompt wider concerns. Of the 12 cases re-opened, none have resulted in disciplinary action.

Five cases were 're'-dismissed by PCC or with advice from one or more Committee members). Two cases were dismissed with advice, the reviewing decision makers' judgement being that the barristers' conduct did in fact raise concerns but that the cases did not merit disciplinary proceedings. One case was re-categorised as out of jurisdiction and referred to the Legal Ombudsman. Two 'comebacks' were treated as new complaints as they raised wholly new issues of conduct beyond the scope of the original complaints. One comeback has since been withdrawn by the complainant who did not wish to pursue the narrow element which the BSB, on review, considered warranted further investigation. The remaining case is under ongoing investigation.

My overall observation is that typically, comebacks amount to the complainant repeating or rephrasing their original complaint. The BSB is required to identify evidence of misconduct in order to refer cases for investigation and be satisfied that it has reasonable prospects of proving misconduct to the criminal standard in order to refer cases for disciplinary action. These are appropriate hurdles. A dissatisfied complainant is not (and should not be) sufficient. It is to be expected that a number of complainants will be dissatisfied with a dismissal decision. In some cases, this dissatisfaction appears to be closely connected with their disappointment with the outcome of their original underlying legal case. Nevertheless, it is good practice that senior attention is given to review comebacks and that where there is a good reason to do so, cases are re-opened. My observation is that this procedure is being consistently and fairly applied.

Unreasonable behaviour policy

During the course of my work, I have observed a small number of complainants repeatedly and persistently contacting the BSB seeking to reopen their case following one or more formal reviews and without apparently presenting any new evidence or providing any other good reason for reconsideration of their complaint. A handful of individuals repeatedly contact the BSB with wide-ranging and apparently unsubstantiated complaints. These are isolated cases. However, there is a risk that they can demand disproportionate attention and divert resources away from higher risk cases, the pursuit of which would more directly support the BSB's regulatory objectives.

To a large extent, handling persistent or vociferous complainants is simply part of the BSB's complaint handling role. Moreover, it is difficult to suggest what the PCD could do to deter unmeritorious complaints without risking deterring genuine cases. Appropriately, the PCD seeks to consider each new complaint on its merits and my observation is that this is indeed the case in practice.

Most other organisations handling complaints publish a clear statement or policy for dealing with 'unreasonable behaviour', which typically includes making unreasonable demands or demonstrating unreasonable persistence. Such policies seek to clarify expectations and set out the organisation's approach to managing those parties whose actions or behaviour are considered unacceptable and are either having a harmful impact on their staff or their ability to provide a consistent level of service to other customers. The BSB has an internal policy which is currently being reviewed and updated. I have recommended that once this exercise has been completed, it should develop an external facing statement of its policy for the benefit of both those contacting the BSB and its own staff.

BSB prosecutions and lessons learnt

My observation is that the BSB actively seeks to learn and apply lessons from unsuccessful prosecutions. PCD prepares a 'Report of Disciplinary hearing – dismissed cases, cost and other feedback' following cases which are dismissed and/or have costs awarded against the BSB or 'other significant feedback for the BSB and its handling of cases'. The case officer prepares the report with input from the assigned prosecutor and/or case examiner. They are circulated internally and are submitted to the PCC for information and discussion.

I have reviewed the 14 Tribunal Chair reports and PCD 'dismissal' reports made during the past year. Where 'lessons' were identified by PCD and/or 'follow up' specified, I sought to ascertain what action had been taken. In most cases this was straightforward and I can give assurance that in light of the most significant rulings likely to impact on the BSB's approach to other cases, prompt action was taken. However, without centralising this process, there is a risk that some lessons may be lost. I have therefore recommend that the PCD captures lessons from 'dismissal reports' centrally so that it can agree an action plan and monitor implementation.

I have observed an increasing number of complex and contested prosecution cases. I have observed PCD responding constructively and professionally. In the files I have reviewed, I have seen evidence that each point raised is considered on its merits and thoughtfully addressed. I have observed that case officers routinely consult the assigned prosecutor, their managers or the PCC for advice to ensure a considered and consistent approach. I have observed that responses are communicated clearly and promptly.

My overall observation is that the BSB complaints and disciplinary processes and procedures are increasingly subjected to procedural challenge and that this is likely to continue. It is reassuring for all stakeholders that in almost all cases, the BSB's processes and procedures are proving to be demonstrably robust. Above all, it is positive that PCD maintain a constructive attitude; prepared to revisit, rectify or revise their approach where necessary whilst demonstrating resilience and determination to pursue allegations of misconduct as appropriate in order to fulfil the BSB's regulatory objectives.

Knowledge Management

I welcome the appointment of a Knowledge Manager within PCD to strengthen internal knowledge management and information flows to PCC members, BSB prosecutors, the profession and the wider public. The BSB recognises that further steps could be taken to provide complainants, potential complainants, barristers and the general public with greater insights into the complaints and disciplinary processes. I welcome the fact that one of the five strategic aims in the BSB's Strategic Plan 2013-16 is 'promoting greater public and professional understanding of what we do and why'.

Further increasing transparency and publishing richer information about the complaints and disciplinary system – such as publishing case studies and significant judgements - would benefit all parties to the process. It would promote public and professional confidence. It could even help promote standards; for example, highlighting cases to remind and/or warn barristers about what conduct is expected and the consequences of failing to meet these standards.

Assurance

In my opinion and based on my observations as summarised above, I am able to provide the BSB Board with a substantial level of assurance that during the period covered in my review the Complaints system has worked well and in accordance with its aims and objectives.

Specifically, I can assure the Board that

- potential breaches of the Code are being identified and appropriately pursued
- decisions are fair and consistent
- communications are clear
- decisions are well reasoned
- staff are polite and professional in their written contacts

In the course of my work I highlighted a handful of cases which required attention. All were promptly addressed and none gave rise to serious or wider concerns.

Based on my observations, I have made a number of recommendations designed to further enhance the BSB's handling of complaints and disciplinary processes. All have been accepted and most have been implemented. These recommendations are summarised in Annex 2, along with an indication of their current status.

I would like to thank the Professional Conduct Department, the Professional Conduct Committee and all the other BSB staff for responding so thoroughly, promptly and patiently to my enquiries.

Isobel Leaviss

INDEPENDENT OBSERVER

June 2013

Annex 1: Aims and Objectives of the BSB's complaints and disciplinary system

Aims

To

- Act in the public interest
- Protect the public and consumers of legal services
- Maintain high standards of behaviour and performance of the Bar
- Provide appropriate and fair systems for dealing with complaints and disciplinary action;
- Promote public and professional confidence in the complaints and disciplinary process;
and
- Ensure complaints are dealt with fairly, expeditiously and consistently

Objectives

To

- Deal with complaints made against barristers promptly, thoroughly and fairly;
- Ensure proportionate action is taken in relation to barristers who breach the Code of Conduct; and
- Be open, fair, transparent and accessible

Annex 2: Summary of recommendations made during 2012-13 and status as at June 2013

Ref	Priority	Recommendation	Status
H2R3	Medium	the PCD extends its recently finalised Disclosure Policy to include Committee minutes and publishes it.	Agreed
H1R1	Medium	that the BSB publishes a summary of the appointment process for its prosecutors, including spelling out the criteria for deciding to approve a barrister for addition to the panel; that the BSB formalises appointments to the panel with an appointment letter and that the BSB assigns an experienced 'mentor' to each of its new prosecutors	Agreed
H1R2	Medium	that the PCD captures lessons from 'dismissal reports' centrally, agrees an appropriate action plan and monitors implementation	Implemented
H1R3	Low	that the instructing letter for prosecutors prompts them to give active consideration to preparing a case chronology to assist the Tribunal.	Implemented
H2R1	Low	following the organisation-wide review of the 'Unacceptable Behaviour by Members of the Public – Guidance to Staff', the BSB publishes an external facing statement or version of this policy.	Agreed
H2R2	Low	when the Committee discusses 'lessons' from cases, the Chair draws out any conclusions or actions for the minutes so that they can be recorded and more systematically followed up as appropriate.	Agreed

Annex 3: Summary of outstanding recommendations from 2011-12 as at June 2013

Ref	Priority	Recommendation	Status
Q2R7	Medium	That prior to adjourning consideration of complaints, the BSB should actively consider what, if any, contemporaneous enquiries should be made in order to capture evidence before memories fade/documents become difficult or impossible to obtain and that guidance to this effect should be incorporated into departmental guidance.	Agreed PG10 Policy Guidance to be updated
Q3R1	Medium	The BSB formalise and publish its policy for commenting publically on complaints and disciplinary proceedings	Under consideration